BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN ROUTON	)	
Claimant	)	
	)	
VS.	)	
	)	
PIZZA HUT	)	
Respondent	)	Docket No. 1,019,825
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 4, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

The ALJ granted claimant's request for preliminary hearing relief in the form of ongoing medical treatment with Dr. Eyster for his right knee complaints as well as payment of the outstanding medical bills and medical mileage. In doing so, the ALJ implicitly found that claimant sustained his burden of proving that he sustained an accidental injury that arose out of his employment with respondent on October 13, 2004.

The respondent requests review of this Order. Respondent concedes that claimant's accident occurred while he was in his employer's service and on respondent's premises, but respondent maintains claimant's fall was due to a personal risk, specifically a prior left knee injury and that his present need for treatment is attributable not to his October 13, 2004 accident, but to his knee giving way as a result of his prior injury and resulting condition. Respondent also contends claimant's injury was the result of walking, an activity that is considered a day-to-day activity and one that does not give rise to liability under K.S.A. 44-508(e).

The only issue to be decided is whether claimant established it is more likely than not that he suffered an accidental injury arising out of his employment with respondent.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant had a previous workers compensation claim involving his left knee in August of 2003. As a result of that injury, in January 2004 Dr. Robert L. Eyster performed arthroscopic surgery on claimant's left knee. Claimant was released by Dr. Eyster in April 2004. Claimant still had pain at this time, but was better.[2] Claimant stated that when he started working for Pizza Hut he was not having problems with his left leg.[3]

On the day of the accident, October 13, 2004, claimant was making pizza dough when the manager asked him to go and fill the Pepsi machine. Claimant went to the back of the store, filled a crate and proceeded back through the kitchen area. As claimant was making his way to his destination, he fell. He testified that "I went down and my knee hit against it [the floor tile] and the two liters went everywhere."[4] He estimated the crate with the pop weighed about 10 pounds. Claimant stated that he did not know if his knee buckled or if he slipped on some food that was on the floor, as it was lunchtime, and it was not uncommon for food to be on the kitchen floor.

Claimant sought treatment for his knee the next day, October 14, 2004. By this time his knee was swollen and he could hardly bend it. Claimant indicated that there was some confusion on where to send him for treatment and he ended up going to see Dr. Eyster who had previously treated his knee.

Claimant states that currently he has constant pain in his knee and cannot put any weight on it. Claimant's pain level went from a 5 out of 10 before the fall to a 10 out of 10 now. Claimant currently is off of work waiting for approval for him to undergo surgery.

Although the ALJ did not provide any rationale or explanation for his Order, it is implicit in his Order that he concluded that claimant met his burden of proving that he

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[1] Although respondent's counsel articulates two separate arguments, they are in essence the same argument. Thus, they have been combined here for purposes of clarity.

[2] P.H. Trans. at 7.

[3] *Id.* at 7.

[4] *Id.* at 8.

sustained an accidental injury that arose out of his employment. The Board affirms this conclusion.

Because the accident occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[5]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[6]

In *Hensley*[7], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to Larson's *The Law of Workmen's Compensation*, Sec. 10.31, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.

Although walking can be described as a normal activity of day-to-day living, K.S.A. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living.

Here, claimant was in respondent's service, performing a job he was asked to perform, carrying a crate weighing approximately 10 pounds when he fell to his knee on a clay tile floor. Based upon this record, the Board finds no rational reason to overturn the ALJ's Order. Like the ALJ, the Board is persuaded that claimant met his burden. He sustained an unexplained fall while performing his job, and such falls have repeatedly been found compensable.[8] Accordingly, the ALJ's preliminary hearing Order is affirmed in all respects.

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[5] *See Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[8] Roberts v. Salina Retailers Association, No. 1,016,052, 2004 WL 3089877 (Kan. WCAB Nov. 19, 2004).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated March 4, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2005.

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director